PENDAKWA RAYA

v.

ISMAIL ATAN

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CIVIL APPEAL NO. 58-5-88]
22 SEPTEMBER 1991

CRIMINAL PROCEDURE: *Admissibility of - First information report - Meaning of first informative report - Report recorded after investigation - Whether constitutes a first information report and admissible - Criminal Procedure Code (F.M.S. Cap. 6) s. 108A.*

CRIMINAL PROCEDURE: *Cautioned statement - Admissibility - Statement recorded by an officer of Cawangan Anti Dadah - At the time of giving evidence officer held the rank of ASP - Whether officer held rank of Inspector and about at the time of recording statement - Section 37A(10) Dangerous Drugs Act 1952.*

CRIMINAL PROCEDURE: *Dangerous drugs - Statutory presumptions to prove possession - Exclusivity of possession not proved - Presumptions cannot be invoked - Dangerous Drugs Act 1952, s. 37(b), d(a).*

EVIDENCE: *Corroboration - Former statements of a witness - Admissibility of - Whether can corroborate a later testimony of the same witness to the same facts - Evidence Act 1950 s. 157.*

EVIDENCE: *Discovery - Statements made in reply to interrogations - Whether lead to discovery - Admissibility of - Evidence Act 1950 s. 27.*

The accused was charged with trafficking in a dangerous drug, that is, cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952.

The prosecution sought to tender the following evidence, *inter alia:*

(a) statements by the accused made in reply to interrogations conducted by one ASP Michael Chin (PW3) which were written down on his notebook and produced in Court as P3: the learned DPP contended that they are admissible under s. 27 of the Evidence Act 1950.

(b) a cautioned statement recorded from the accused by one ASP Ahmad Jais (PW9) who is attached to the Cawangan Anti Dadah (CAD).

(c) the police report made by PW3 which the learned DPP contended as the first information report. Alternatively it was argued that the report can be admitted under s. 157 of the Evidence Act 1950, that is, where former statement of a witness is admissible to corroborate later testimony of the same witness as to the same facts.

At the end of the prosecution case, the learned DPP submitted that the accused had possession of the said house where the cannabis was kept, that is, in the ice box. Thus, the presumptions under s. 37(b) and (da) of the Dangerous Drugs Act 1952 should be invoked.

Held:

[1] Statements from the accused made in reply to the interrogations must lead to discovery in order to be admissible under s. 27 of the Evidence Act 1950. Based on the facts, the

statements by the accused did not lead to discovery and, they are inadmissible.

[2] Cautioned statement must be recorded by an officer of or above the rank of Inspector in order to be admissible under s. 37A(1) of the Dangerous Drugs Act 1952. Although PW9 was an Asst. Superintendent of Police when giving evidence at this trial, there was no evidence that he held the rank of an Inspector and above when the cautioned statement was recorded by him. The cautioned statement was inadmissible.

[3] Statements made and recorded after investigation be it in the form of police report or otherwise is not a first information report but more of an investigation statement.

[4] The prosecution have failed to prove a *prima facie* case against the accused and the accused is not called to make his defence.

[Accused acquitted and discharged.]

Cases referred to:
PP v. Liew Sam Seong [1982] 1 MLJ 223 ***(cit)***
Das v. Weston 16 CWN ***(cit)***
*PP v. Foong Chee Cheong [1970] 1 MLJ 97****(cit)***

Legislation referred to:
Criminal Procedure Code, s. 108A
Dangerous Drugs Act 1952 ss. 37A(1), 37(b), (da), (g), 39B(1)(a), (2)
Evidence Act 1950 ss. 27, 157

Other source referred to:
Criminal Procedure Code, Mallal, 4th Edn., p. 138

For the accused - Karpal Singh
For the prosecution - Hadhariah bte Syed Ismail

JUDGMENT

James Foong JC:

The accused is charged as follows:

> Bahawa kamu pada 7 Januari 1987 jam lebih kurang 4.15 petang di sebuah rumah tidak bernombor di Kg. Kempas Baru, Off Jalan Permatang Satu, Tampoi, Johor Bahru, di dalam daerah Johor Bahru, di dalam Negeri Johor telah mengedar dadah berbahaya, iaitu kanabis dengan jumlah berat 4210.47 grams bagi pihak diri kamu sendiri,dan dengan tu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B(2) akta yang sama.

The prosecution case was that on 7 January 1987 at about 4.15 p.m., ASP Micheal Chin (PW3) attached to the Cawangan Anti Dadah Johor, led a raiding party consisting of 7 other police personnel to a squatter area at Kampung Kempas Baru, Tampoi, Johor Bahru. This raid was conducted in pursuant to information which PW3 personally received earlier.

In the said area, there were two squatter houses. Before approaching the said houses PW3 directed his men to split into two groups. One group following him approached a house belonging to a person called Affandi. Another group went to guard a nearby house.

At Affandi's house, PW3 found several persons therein but no sign of a person described as a midget. In consequence to a search the accused which is of midget size was found hiding in the toilet.

The accused was then brought out of Affandi's house where he was interrogated by PW3. The following questions were asked by PW3 and answered by the accused, which were there

and then, immediately written down by PW3 on his notebook produced in Court as P3.

"Siapa punyai rumah itu?" PW3 asked the accused pointing to a house.

"Mak angkat saya punya." The accused replied.

"Dimana you simpan ganja itu?" PW3 asked the accused.

"Dalam ice box di rumah". The accused answered.

PW3 then brought the accused to the house which PW3 pointed earlier. The front door of this house was locked with a padlock. From a bunch of keys recovered from the accused, PW3 singled out one key and asked the accused to open the padlock with it. The padlock could not be opened. More questions were asked by PW3 relating to this padlock and its answers were also recorded by PW3 in P3.

At this stage, the defence Counsel Mr. Karpal Singh objected to the admissibility of these answers and those purportedly to be given earlier by the accused since no caution was administered to the accused before the answers were given. The learned Deputy Public Prosecutor however argued that she is seeking admission of these answers of the accused under s. 27 of the Evidence Act.

On this point this Court made the following rulings:

Firstly, the answer by the accused to the first question posed by PW3 had no relevance to s. 27 of the Evidence Act. "Siapa punya rumah itu?" PW3 asked pointing to a house. The accused replied, "Mak angkat saya punya." This statement by the accused led to no discovery since the police did not at that time proceed to make any discovery on this matter.

The second question by PW3 was "Dimana you simpan ganja?". Reply from the accused was, "Didalam rumah dalam ice box". Question to be asked here is whether the ganja was discovered as a result of this information given by the accused? The answer is no. Firstly, the police did not discover the house which contained the ice box. In fact, they already knew of the particular house. This is from the evidence of PW3 himself when he stated that, "I brought the accused to the house which I pointed earlier". So in this case there is no discovery because the fact i.e. the house had already been discovered. (See the case of *PP v. Liew Sam Seong* [1982] 1 MLJ 223.)

As regards to the ice box, it must be read with the particular house. Therefore if the particular house is already discovered one cannot use the ice box as a separate item of discovery because it cannot stand on its own. The statement must be read as a whole otherwise any ice box anywhere found to contain ganja would be attributed to the statement made by the accused. Under such circumstances, this Court ruled that the second statement made by the accused could not be admissible under s. 27 of the Evidence Act.

As regards to the third statement "Ini dia." made by the accused when he opened the refrigerator door, this Court found it inadmissible under s. 27 of the Evidence Act. This statement caused no discovery by the police. The ganja was already found.

Now, relating to the other answers purportedly given by the accused such as:

To question	:	Cuba buka pintu rumah?
Answer	:	Susah buka. Mangga itu selalu jam lama.
To question	:	Kalau pecah pintu itu sahaja?
To question	:	Mana you masuk?

Answer : Melalui tingkap.

I found these to be inadmissible as such information led to no evidence of discovery.

As the padlock could not be opened, a member of the police party obtained an axe. With this, the police prised open the padlock and entered the said house. In the said house, the accused led PW3 to a refrigerator. The accused opened it and said "Inilah dia." This again cannot be admissible as it does not fall within the confines of s. 27 of the Evidence Act since nothing was discovered.

In the refrigerator, PW3 found various stacks of ganja sticks which on analysis by the chemist were found to be cannabis with a total nett weight of 4210.47 grams.

The accused was then handcuffed and together with the drugs and the refrigerator were brought to the police station.

At the police station, a cautioned statement was recorded from the accused by one ASP Ahmad Jais (PW. 9). Mr. Karpal Singh objected to the admissibility of this cautioned statement. At the end of a trial within a trial, this Court held that the cautioned statement was inadmissible. The following are the reasons:

Firstly, there was no evidence extracted from PW9 that at the material time when the cautioned statement was recorded PW9 held the rank of a police inspector. Section 37A(1) of the Dangerous Drugs Act 1952 clearly states that such cautioned statement must be recorded "...by such person to or in the hearing of any officer of or above the rank of Inspector...".

Though PW9 is an Assistant Superintendent of Police when giving evidence at this trial, there was no evidence that he held the rank of an Inspector and above when the cautioned statement was recorded by him. The learned Deputy argued that since PW9 was attached to the intelligence section of the Cawangan Anti Dadah (CAD) at the material time, he must have been of the rank of Inspector and above. This Court finds no merits at all in this argument since, there are no evidence before this Court to say that all officers in the CAD intelligence section hold the rank of Inspector and above and neither can the Court presume it to be so.

Another important point which arose during the case of the prosecution was when the learned deputy attempted to tender in a police report made by PW3. PW3 as stated earlier was the raiding officer in this case. Mr. Karpal Singh objected to this report being admissible since it is not a first information report. The learned Deputy replied stating that this is the first police report made in this case as such it shall be admitted. Further it is contended that this report can be admitted under s. 157 of the Evidence Act, where former statement of a witness is admissible to corroborate later testimony of the same witness as to the same facts.

After hearing arguments from the prosecution and the defence, this Court ruled that PW3's police report is not admissible.

First information report is admissible as evidence under s. 108A of the Criminal Procedure Code. However, one must first determine whether it is a first information report.

As defined by Dr. Mallal in his 4th Edition of the Criminal Procedure Code at p. 138:

> 'information' in this section means something in the nature of a complaint or accusation or at least information of a crime, given with the object of putting the police in motion in order to investigate as distinguished from information obtained by the police when actively

investigating a crime.

> The information referred to may come from more than one source or more than one such information may be recorded at or about the same time, but once police have taken active steps in investigation, any written statement written by them fall within s. 121 and are inadmissible in evidence.

The rational is rather simple; if statements are recorded after investigation, be it in the form of a police report or otherwise, it can be made to fit into the case as has then developed. This would not be fair to the accused person since by that time the police could say what they wish to suit the circumstances of the case. (See the cases of *Das v. Weston* 16 CWN and *PP v. Foong Chee Cheong* [1970] l MLJ 97).

In this case, the first information report was the information PW3 received from his source. If this report is tendered it can be admitted under s. 108A of the Criminal Procedure Code. In fact, if the information is reduced to writing, it will be of considerable value to this trial since its material can be compared with subsequent materials derived from such investigation. This would enable the Court to evaluate these evidence in order to come to a just decision. However, in this case, PW3 had proceeded actively in his investigation and, only after an almost exhaustive exercise, he returned to the police station to write this report. This is certainly not a first information report but more of an investigation statement. Anything can be filled up by the writer to fit the circumstances of the case as it had developed. Admission of such report cannot be allowed.

As the contention of the learned Deputy that this report of PW3 can be used to corroborate the testimony of PW3, this Court finds that before former statements of witness may be proved, it must first of all be admissible. If such statements are not admissible in law, it cannot be used to prove to corroborate later testimony as to the same facts.

At the end of the prosecution case, the learned Deputy also submitted to this Court that the accused had possession of the said house and as such the presumptions under s. 37(b) and (da) of the Dangerous Drugs Act should be invoked against the accused.

The only evidence this Court finds of any significance to support the learned deputy's contention are:

(a) a small jacket, an account book, a photo album found in a room of the said house where the drugs were and

(b) the bunch of keys found on the accused, and

(c) from the testimony of PW10, the adopted mother of the accused.

Taking item (a) first, this Court finds no evidence that the small jacket must have belonged to the accused. This small jacket was found hanging in the bedroom of the house and no evidence was led to say this jacket fitted the accused. Though the accused is a midget, the size of this jacket can also fit any small children. The savings book and a photo album was recovered from a cupboard in the bedroom. No evidence was led to say that these were exclusively the only items in the whole house and therefore by implication the accused must have possession of the said house. In fact from the photographs P. 2A-G, the house was full of things indicating that it is more like a store room. Therefore what significance are these few items said to belong to the accused be compared to the greater number of other things found therein which are not proved to have belonged to anyone.

As to the bunch of keys, it opened no doors to the said house and therefore should be

dismissed completely to imply care or management of the said house to belong to the accused.

Finally as for the evidence of PW10, though this witness testified that she actually asked the accused to look after the house while she was away in Singapore, the learned Deputy for reason best known, chose to impeach her credit. After careful consideration, this Court found no material differences between a statement she made to the police and the testimony given in this Court. As such this Court orders no impeachment proceedings to be made against her.

From the testimony of PW10, though she did give the house to the accused to look after, she said that the accused never stayed in that house. Instead the accused stayed with Affandi in Affandi's house which was next door. Besides, there was a couple staying in the said house some three weeks before the arrest of the accused. All these evidence point to the fact that the accused had no exclusive possession of the said house.

One other fundamental observation this Court was directed was the existence of a hole in the window at the side of the house as shown in the photograph P. 2B and P. 2C. By this the prosecution implied that the accused being a midget, got in and out of the house through this hole. However, this is by way of implication where no evidence whatsoever were tendered to substantiate it. On the other hand, there are evidence of 2 policemen who were able to get in and out of this house through this same hole. After the raid on this house, the police party had the front door of the house bolted for reasons best known to themselves, from the inside. Therefore when one of their men who bolted the door had to come out he climbed out through this hole. The next day, when the investigating officer and PW3 went to the house to investigate, they instructed another policemen to enter the said house through this same hole in order to open the back door to allow others to enter. From this, one would come to an irresistable conclusion that virtually anyone of not too huge a size can actually enter this house. Such being the case, where is the exclusivity of possession of the said house attributed to the accused?

In view of the aforesaid, this Court finds that the presumption under s. 37(b)(g)(da) of the Dangerous Drugs Act cannot be evoked against the accused. Under the aforesaid circumstances, this Court finds that the prosecution have failed to prove a *prima facie* case against the accused and the accused is not called upon to make his defence. The accused is hereby acquitted and discharged.

Also found [1992] 2 CLJ 1253